

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP16
STATE OF WISCONSIN**

Cir. Ct. No. 2002CF436

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH BEAUCHAMP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
KRISTINA M. BOURGET, Judge. *Affirmed.*

Before Hruz, Seidl and Curley, JJ.

¶1 PER CURIAM. Keith Beauchamp appeals an order denying his WIS. STAT. § 974.06¹ postconviction motion without a hearing. Beauchamp

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

contends a note sent by one of the jurors to the court near the end of the trial showed the juror failed to hear or failed to comprehend the trial testimony and raised a question of her attentiveness. He argues his trial counsel was ineffective for failing to request a mistrial or voir dire regarding the juror's capacity, and the circuit court should have sua sponte investigated the juror's attentiveness. The State contends the motion is procedurally barred by Beauchamp's earlier postconviction motions and appeals pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶2 We assume, without deciding, that Beauchamp provided sufficient reason for failing to raise the present issues in his earlier postconviction proceedings. Nonetheless, we affirm the order denying the postconviction motion because we conclude Beauchamp's motion does not establish that the juror could not hear or comprehend the evidence and there was no showing of inattentiveness.

BACKGROUND

¶3 Beauchamp was charged with first-degree sexual assault of a child as a persistent repeater. After the circuit court informed potential jurors of the nature of the case and began the voir dire process in open court, the jury selection process moved to the judge's chambers because several potential jurors indicated a need to discuss sexual assaults in private. After several jurors were dismissed, Juror 508 was brought into chambers for individual voir dire. Juror 508 immediately informed the court that she had "a little hearing loss," and the court provided her with ear phones.

¶4 After the jury was selected, the court told the panel, "If you can't hear during the trial, raise your hand and let us know, and is that microphone working okay?" Juror 508 answered, "Yes." The court also informed the jury of

the procedure to be followed if jurors wished to ask questions of witnesses. The court noted:

Also, I remind you that if you want to ask questions of a witness, you need to do it during evidence. On a couple of occasions I've had jurors send questions out while they're deliberating wanting more information from witnesses. I can't give you any more information from witnesses once the evidence is closed, so if you have a question, be sure to ask it when that witness is on the stand.

¶5 After several witnesses testified and questions were posed regarding allegations that the victim's brothers requested money or that Beauchamp paid for sexual favors, the State rested. Before Beauchamp testified, the bailiff asked to speak with the judge, and the court informed the parties that "the juror with the headphones" indicated she had some questions for past witnesses who had been released from their subpoenas. The court noted,

I haven't had any indication she's not hearing what's going on, and I, again, asked the jurors very clearly to raise their hands if anybody couldn't hear and I haven't seen her do that, so I think you need to tell her that if she has questions, she has to ask them when the witness is on the stand and she cannot ask them of witnesses who are gone

¶6 After Beauchamp completed his testimony, while he was still on the witness stand, the court asked whether the jury had any questions. Juror 508 responded, "I do," and handed the bailiff a note with three questions: "Why are we having this trial? Who is charging? Is someone suing for money?" After both parties objected to the court posing those questions to Beauchamp, the court informed the jury, "This isn't a question that I can ask at this time of this witness, and I think some of this will be explained in my closing instructions, the information I give to you at the end of the trial, all right?"

¶7 Beauchamp contends those three questions showed Juror 508's inability to hear, inattentiveness, confusion, or lack of comprehension sufficient to require his counsel and the court to further question her and to consider requesting a mistrial. The circuit court denied Beauchamp's postconviction motion without a hearing, concluding Beauchamp failed to allege sufficient facts to raise a question of fact or the record conclusively demonstrated that he was not entitled to relief. The court concluded Beauchamp was not prejudiced by his counsel's failure to request a mistrial or further inquiry into the juror's ability to serve because the court would not have granted any request for a mistrial, there was an insufficient showing of juror inattentiveness, and the allegation that Juror 508's questions demonstrated that she did not understand the proceedings was speculative.

DISCUSSION

¶8 Whether a motion is sufficient to warrant an evidentiary hearing is a question of law that this court decides de novo. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Even when the motion is not sufficient to require a hearing, the circuit court has discretion to conduct an evidentiary hearing, and this court reviews that decision for an erroneous exercise of discretion. *See State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Whether Beauchamp's trial counsel was ineffective for failing to seek voir dire or a mistrial based on Juror 508's questions presents a mixed question of law and fact. *See State v. Jenkins*, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. *Id.* Whether counsel's conduct violated Beauchamp's right to effective assistance of counsel presents a question of law. *See id.* To establish ineffective assistance of counsel, Beauchamp must demonstrate both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). This court, like the

circuit court, will confine our review of counsel's performance to the question of whether Beauchamp established prejudice from his counsel's failure to seek voir dire or a mistrial.

¶9 As Beauchamp acknowledges in his briefs on appeal, the success of his claims turns on whether Juror 508's questions constitute a sufficient showing of inattentiveness, confusion, or lack of comprehension to warrant further inquiry. We conclude his motion fails to make an adequate showing.

¶10 First, Beauchamp's motion does not establish a factual basis for believing Juror 508 could not hear material portions of the trial. After the court provided the juror with earphones, she did not express any difficulty hearing or answering the court's questions. The court confirmed the earphones were working, and nothing in the transcript indicates that Juror 508 had any difficulty hearing the testimony.

¶11 Second, the questions posed by the juror do not suggest an inability to comprehend material testimony. The questions reflected some confusion about the nature of the proceedings and the procedural status of the case. But, as the trial court noted, the subsequent jury instructions addressed these questions. The instructions identified the jury's duties regarding the trial, explained the nature of the charge, the presumption of innocence, and the State's burden of proof. The instructions clarified that this was a criminal, not a civil matter, despite substantial discussion about possible financial motives for the accusers to make the allegations. Because Beauchamp's motion does not show sufficient inattentiveness, confusion, or lack of comprehension by Juror 508 to merit concern about her ability to hear and understand the evidence and follow the court's

instructions, the circuit court properly rejected his claims that the court or counsel was required to conduct further voir dire or consider a mistrial.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

